Supreme Court, U.S.
FILED
AUG 21 1997
CLERK

(9)

No. 96-1590

In The

Supreme Court of the United States

October Term, 1996

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, and ORIN PARKER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF THE PETITIONER

JAMES BOPP, JR.
Counsel of Record
PAUL R. SCHOLLE
BOPP, COLESON & BOSTROM
2 Foulkes Square
401 Ohio Street
P.O. Box 8100
Terre Haute, IN 47808
(812) 232-2434
Counsel for Amicus Curiae

August 21, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION DEALT WITH HEREIN

Under this Court's precedents, the First Amendment protects "issue advocacy" absolutely – against monetary limitations and against disclosure provisions. However, the Federal Election Campaign Act of 1971, *as amended*, 2 U.S.C. § 431 *et seq.* (FECA), defines the term "political committee" broadly to include groups of citizens which make "contributions" or "expenditures" of $1,000 in a calendar year. A group defined as a "political committee" is subjected to burdensome disclosure requirements and severe contribution limits. Thus, organizations which make expenditures almost exclusively for "issue advocacy" are subjected to such onerous requirements and limitations if they have made a single $1,000 contribution to a candidate within a calendar year. Does the "major purpose test," enunciated by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) (*Buckley*) and *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), equally apply to an organization that makes "contributions," as well as to one that makes "expenditures," thereby avoiding the chilling effect on "issue advocacy," which results from a broad definition of "political committee"?

TABLE OF CONTENTS

Page

QUESTION DEALT WITH HEREIN i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS CURIAE 1

INTRODUCTION 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. IN ORDER TO PRESERVE REPRESENTATIVE SELF-GOVERNMENT, THIS COURT HAS STAUNCHLY PROTECTED POLITICAL SPEECH IN GENERAL, AND ISSUE ADVOCACY IN PARTICULAR 5

A. Free political speech is indispensable to the functioning of democracy 5

B. This Court developed the "express advocacy" test in *Buckley* in order to protect the free discussion of issues in political campaigns ... 7

C. By protecting issue advocacy from infringement, the "express advocacy" test assures that debate on public issue will remain robust 13

II. THE "MAJOR PURPOSE TEST" IS A NECESSARY ADJUNCT TO THE "EXPRESS ADVOCACY TEST"; THE TWO TESTS WORK IN TANDEM TO PROTECT ISSUE ADVOCACY ... 16

TABLE OF CONTENTS – Continued

Page

A. This Court developed the "major purpose test" in *Buckley* in conjunction with the "express advocacy test" in order to protect issue advocacy 16

B. This Court reaffirmed and further explicated the meaning and rationale of the "major purpose test" in *MCFL* 20

III. THE DECISION OF THE COURT BELOW IS ERRONEOUS AND WOULD RESULT IN THE EVISCERATION OF THE PROTECTION OF ISSUE ADVOCACY UNDER THIS COURT'S "MAJOR PURPOSE TEST." 21

A. Contrary to the court of appeals, the plain language that this Court used indicates that the "major purpose" at issue is that of the organization, not the disbursement 22

B. Contrary to the court of appeals, "independent expenditures" are not the most protected form of political speech, nor are they at issue in this case 24

C. Contrary to the court of appeals, there is a serious constitutional problem in treating organizations such as AIPAC as "political committees"; the court of appeals' understanding of the "major purpose" test would have dire implications for the First Amendment protection of issue advocacy 25

D. Contrary to the court of appeals, the major purpose test examines disbursements in order to determine whether an entity is a "political committee." 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Akins v. Federal Election Commission, 101 F.3d 731 (D.C.Cir. 1997) ..... *passim*

Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*) .. *passim*

Clifton v. Federal Election Commission, 927 F. Supp. 493 (D.Me. 1996) *aff'd on alternate grounds*, No. 96-1812 (1st Cir. June 6, 1996) 12

Faucher v. Federal Election Commission, 743 F. Supp. 64 (D.Me. 1990), *aff'd*, 928 F.2d 468 (1st Cir. 1991), *cert. denied sub nom. Federal Election Commission v. Keefer*, 502 U.S. 820 (1991) 12

Federal Election Commission v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315 (D.D.C. 1979) 12

Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2nd Cir. 1980) 12

Federal Election Commission v. Christian Action Network, 894 F. Supp. 946 (W.D.Va. 1995), *aff'd per curiam*, 92 F.3d 1178 (4th Cir. 1996) 12

Federal Election Commission v. Colorado Republican Federal Campaign Committee, 839 F. Supp. 1448 (D.Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded*, ___ U.S. ___, 116 S.Ct. 2309 (1996) 12

Federal Election Commission v. Machinists Non-Partisan Political League, 655 F.2d 380 (D.C.Cir.), *cert. denied*, 454 U.S. 897 (1981) 5

Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Federal Election Commission v. National Organization for Women, 713 F. Supp. 428 (D.D.C. 1989) 12

Federal Election Commission v. Survival Education Fund, Inc., No. 89 Civ. 0347 (TPG), 1994 WL 9658 (S.D.N.Y.), *aff'd in part and rev'd in part on alternate grounds*, 65 F.3d 285 (2nd Cir. 1995) 12

Mills v. Alabama, 384 U.S. 214 (1966) 6

New York Times v. Sullivan, 376 U.S. 254 (1964) 4, 5, 13

Stromberg v. California, 283 U.S. 359 (1931) 5

Thomas v. Collins, 323 U.S. 516 (1945) 11

Whitney v. California, 274 U.S. 357 (1927) 5, 7

UNITED STATES CONSTITUTION

First Amendment ..... *passim*

STATUTES

2 U.S.C. § 431 *et seq.* 2

2 U.S.C. § 431(4)(A) ..... *passim*

2 U.S.C. § 431(17) 24

2 U.S.C. § 431(h) 16

2 U.S.C. § 434(a)-(d) 18

2 U.S.C. § 434(b) 13, 27

2 U.S.C. § 434(e) 8, 16, 17, 19

2 U.S.C. § 437g(a)(8) 3

2 U.S.C. § 441b 13

18 U.S.C. § 608(e)(1) 10

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (6th ed. 1990)..... 10

James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 U. West. L.A. L. Rev. 1 (1997)..... 8

INTEREST OF THE AMICUS CURIAE

The National Right to Life Committee, Inc. (NRLC) is a nonprofit organization whose purpose is to promote respect and dignity for all human life. NRLC engages in various political, legislative, legal and educational activities to further the concept of the sanctity of human life. In doing so, NRLC routinely makes expenditures for issue-oriented communications advocating its political point of view on pro-life issues. Under the ruling of the court of appeals, NRLC's First Amendment right to engage in such communications without being subject to severe burdens on such speech could be threatened. NRLC seeks to protect its exercise of First Amendment rights by addressing the legal issues presented by this case.[1]

INTRODUCTION

The First Amendment's protection of political speech occupies a venerable position in the Nation's history and in this Court's jurisprudence. The Court has long recognized that political speech is critical to the functioning of our representative democracy. Without it, we lack even the rudimentary capacity to ensure the election of leaders who will represent us faithfully and well. For, if the mortar of free political speech is permitted to crumble, the edifice of self-government will inevitably fall and, with it, the manifold liberties protected by the Constitution. For this reason, this Court has always staunchly protected political speech. Moreover, recognizing that the right of political association is integral to the

---

[1] Consents from parties to filing this Brief have been filed with the Clerk of this Court. *Amicus Curiae* National Right to Life, Inc. supports the position of the Federal Election Commission with respect to the issue of the "major purpose test."

Counsel for a party did not author this Brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members or its counsel made a monetary contribution to the preparation and submission of this Brief.

exercise of political speech, this Court has vigorously protected political association as well.

STATEMENT OF THE CASE

Under the Federal Election Campaign Act of 1971, *as amended*, 2 U.S.C. § 431 *et seq.* (FECA), an organization which is properly termed a "political committee" is subject to various reporting and disclosure requirements. As the court below stated,

> [o]nce designated a political committee, an organization must file periodic reports disclosing all receipts and disbursements and identifying each individual to whom it gives or from whom it receives more than $200.

Akins v. Federal Election Commission, 101 F.3d 731 (D.C.Cir. 1997) (*Akins*).[2] This Court has held that such reporting and disclosure requirements constitute burdens on free speech which may not be imposed absent a compelling governmental interest which is implemented by narrowly-tailored means. *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976) (*per curiam*) (*Buckley*). Although such requirements and limitations can be constitutionally imposed on *true* political committees, this Court recognized the danger of applying them to groups of citizens which engage in "issue discussion." *Id.* at 78-80.

Because "issue discussion" (or "issue advocacy" as it is more often termed) resides at the heart of First Amendment concerns, this Court developed what has come to be known as

---

[2] The court below also noted that designation as a "political committee" results in a limitation on the right of a group to make contributions to a political candidate: "[a]nd [a group designated as a political committee] is prohibited from contributing more than $1,000 to any candidate." *Akins v. Federal Election Commission*, 101 F.3d 731, 734 (D.C.Cir. 1997) *citing* 2 U.S.C. § 441a(a). Contribution limits represent even more severe restrictions on political speech and association than do disclosure requirements. As this Court made clear in *Buckley v. Valeo*, contribution limits implicate the rights to free speech and freedom of association and, therefore, are subject to exacting scrutiny. 424 U.S. 23-25.

the "major purpose test." *Id.* Under that test, a group which engages in issue advocacy may not be considered a "political committee" (thus becoming subject to burdensome disclosure requirements and limitations upon the right to make contributions) unless it is under the control of a candidate or unless its "major purpose" is the election or defeat of candidates. *Id.* at 79.

In this case, Respondents Akins *et al.* filed a complaint with the Federal Election Commission (FEC) alleging that the American Israel Public Affairs Committee (AIPAC) was a "political committee" under the definition contained in 2 U.S.C. § 431(4)(A), because it "had made campaign contributions and expenditures in excess of $1,000." *Akins*, 101 F.2d at 734. According to the complaint, AIPAC met the statutory definition of political committee because it used full-time staff to meet with candidates for federal office, disseminated campaign literature and encouraged its supporters to provide aid to political candidates, and such activities allegedly cost more than $1,000. *Id.* However, the FEC found that there was not probable cause to believe that AIPAC was a political committee because "its campaign-related activities were only a small portion of its overall activities and not its major purpose." *Id.* Indeed, AIPAC had an annual budget of $10,000,000, only a very small percentage of which was alleged to have been dedicated to putative "contributions." *See id.* at 744 n.13. Believing that "an organization is a political committee only if its major purpose is the influencing of federal elections," the FEC dismissed the complaint. *Id.* at 734 and 735.

Respondents sued the FEC pursuant to 2 U.S.C. § 437g(a)(8), a provision which allows a complainant to challenge the agency's refusal to institute enforcement proceedings. *Id.* at 734. The district court ruled in favor of the FEC, holding that its interpretation of the term "political committee" was "reasonable." *Id.* at 735. The court of appeals initially affirmed, but upon re-hearing, reversed. *Id.* at 735 and 744. This Court granted the FEC's petition for a writ of *certiorari*.

Respondents ask the Court to do what it has never done: to permit wholesale infringement of issue-oriented political speech by groups of citizens solely because such groups have exercised their right to free association by making small monetary contributions to candidates for political office. Such is the inevitable effect of the ruling of the court below. In order to prevent such infringement of First Amendment rights, this Court should reverse the lower court's decision.

SUMMARY OF THE ARGUMENT

Historically, this Court has recognized that a concern for the protection of political speech lies at the heart of the First Amendment. *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). This concern stems from the instrumental role of free speech in the machinery of representative self-government. *Buckley*, 424 U.S. at 14-15. In the specific context of election law, this Court has placed an impermeable protective barrier around that species of political speech known as "issue advocacy." *Id.* at 39-51. It has done so by developing the "express advocacy test" and the "major purpose test," two constitutionally-required limiting constructions. *Id.* at 78-81. Whereas the "express advocacy test" focuses on the nature of the speech, the "major purpose test" focuses on the identity of the speaker. *Id.* at 79. Ultimately, both tests have the same *raison d'etre*: to protect issue advocacy from governmental infringement. *Id.* They work in tandem, as two necessary components of one speech-protective judicial mechanism. *Id.*

The decision of the court below, however, misunderstands the vital role of the major purpose test in protecting the right of groups to engage in issue advocacy without the heavy burdens which apply to political committees. Being labelled as a "political committee" under FECA (for the mere act of making a $1,000 contribution to a candidate) would result in subjecting an organization's expenditures for *issue advocacy* to FECA's disclosure provisions and, as stated above, would severely limit contributions. Yet this Court has placed issue advocacy entirely beyond the reach of governmental regulation; it has never permitted issue advocacy to be burdened in

any manner, not even by disclosure provisions. In order to buttress this protection of issue advocacy, this Court should prevent circumvention of the "express advocacy test" through the lower court's ill-conceived interpretation of the "major purpose test." This Court should do so by holding that an organization is not a "political committee" under FECA unless its major purpose (determined by objective standards) is the nomination or election of candidates.

ARGUMENT

I. IN ORDER TO PRESERVE REPRESENTATIVE SELF-GOVERNMENT, THIS COURT HAS STAUNCHLY PROTECTED POLITICAL SPEECH IN GENERAL, AND ISSUE ADVOCACY IN PARTICULAR.

A. Free political speech is indispensable to the functioning of democracy.

The protection of political speech has a long provenance in this Court's case law. As this Court stated in *New York Times v. Sullivan*, "that freedom of expression on public questions is secured by the First Amendment has long been settled by our decisions." 376 U.S. at 269. Indeed, "public discussion" is not only a political right, it "is a political duty." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring). This stems from the fact that the "opportunity for free political discussion" is vital to assuring "that government may be responsive to the will of the people and that changes may be obtained by lawful means." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

Thus, "the public discussion of issues" resides at the core of First Amendment concerns. *Buckley*, 424 U.S. at 39. This proposition is manifest both on the face of the First Amendment and in the circumstances of its adoption. The framers of the Amendment made clear their intention that the protection of political discourse was their goal. *See Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380, 389 n.17 (D.C.Cir.), *cert. denied*, 454 U.S. 897

(1981). As this Court explained in *Buckley*, there is no doubt that the First Amendment's framers specifically intended to protect political speech: "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." 424 U.S. at 14, *quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966). This intention was based, at least in part, on the instrumental role of free speech in the system of representative self-government established by the Constitution. That is, the framers understood that free political speech is "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. This Court stated that,

> in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

Id. at 14-15. As a practical matter, unless citizens may exercise their right to speak freely on political matters – including discussions of candidates and their qualifications – self-government is impossible. In order to make good decisions regarding who will represent us, citizens must have access to ideas and information concerning the positions candidates take on issues and to their fitness to hold office (their character, accomplishments and qualifications). *Id.* In order for those ideas and that information to be available to the electorate, there must be free commerce in the marketplace of ideas. If the marketplace of ideas is compromised by the governmental restrictions on speech, then self-governance will suffer and so too will all of the other freedoms guaranteed by the Constitution. As this Court has stated, "[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues." *Id.* at 49 n.55.

Free speech on political matters, then, is the key to the preservation of self-government and concomitant personal liberties. This Court's decisions have been unanimous in upholding this principle. Political free speech is strictly guarded by the Constitution for at least three inextricably

interwoven reasons: (1) because it was the Framer's intention to preserve free speech (which is obvious on the face of the First Amendment and in the history surrounding its adoption); (2) because political speech has an indispensable role in the preservation of self-government; and (3) because, given its role in preserving self-government, free political speech undergirds all other civil liberties protected by the Constitution. In addition, as this Court's precedents show, free political speech must be protected purely as a matter of individual civil liberty.[3]

Adhering to this Court's traditional jurisprudence, the *Buckley* Court rooted its First Amendment analysis in the purpose of protecting the institutions of democracy. 424 U.S. at 14-15. Therefore, it is evident that the *Buckley* Court was avid to protect political speech against infringement under FECA.

B. This Court developed the "express advocacy" test in *Buckley* in order to protect the free discussion of issues in political campaigns.

In *Buckley*, this Court recognized that certain provisions of FECA inhibit the exercise of protected political speech.[4] In

---

[3] "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means." *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 n.10 (1986) (*MCFL*) *quoting Whitney v. California*, 274 U.S. 357, 375 (1927) Brandeis, J., concurring.

[4] This section of the Brief explains this Court's development of the "express advocacy test" in *Buckley* as a constitutionally-mandated narrowing construction of FECA. Although the "express advocacy test" is not directly at issue in this case, it is inextricably intertwined with the "major purpose test" which is the central focus of this case. The "express advocacy test" is discussed at this point in the Brief in order to provide a foundation for the subsequent discussion of the "major purpose test." For a thorough discussion of the "express advocacy test" and the "major purpose

considering the constitutionality of the provision then contained in 2 U.S.C. § 434(e) (which required disclosure of campaign-related contributions and expenditures by persons other than political committees), this Court stated that the provision

> raises serious problems of vagueness particularly treacherous where . . . the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights.

Buckley, 424 U.S. at 76-77. Section 434(e) required

> "[e]very person . . . who makes contributions or expenditures" aggregating over [a certain threshold] in a calendar year . . . to file a statement with the Commission.

Id. at 74-75. As this Court noted,

> "[c]ontributions" and "expenditures" are defined in parallel provisions in terms of the use of money or other valuable assets "for the purpose of . . . influencing" the nomination or election of candidates for federal office.

Id. at 77 (footnote omitted). This Court explained that "it is the ambiguity of this phrase ["for the purpose of . . . influencing"] that poses constitutional problems." *Id.* That phrase was constitutionally infirm because it had the "potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79 (footnote omitted). Therefore, in order to "insure that the reach of § 434(e) is not impermissibly broad," this Court narrowly construed the term "expenditure" to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80.

In a footnote to the term "expressly advocate" in the last-quoted passage, the Court referred to an earlier footnote in

---

test," *see* James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 U. WEST. L.A. L. REV. 1 (1997).

Buckley (424 U.S. at 44 n.52) in which it had defined "express advocacy" for the purpose of narrowly construing a different provision of FECA. *Id.* at 80 n.108. In the earlier footnote, this Court explained that the section of FECA which placed a $1,000 annual ceiling on expenditures . . . relative to a clearly identified candidate must be

> restrict[ed] . . . to communications containing *express words of advocacy* of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

424 U.S. at 44 n.52 (emphasis added).

The *Buckley* Court referred to this constitutionally-required narrowing construction (which has become known as the "express advocacy test") repeatedly throughout the opinion. In no fewer than eight separate references,[5] this Court made clear that the "express advocacy test" was a "narrow[ ] and explicit[ ] constru[ction]" of FECA, *id.* at 44, which reached only communications which include "explicit words of advocacy" or communications which "in express terms

---

[5] This Court described "express advocacy" in the following words: (1) "explicit words of advocacy," *Buckley*, 424 U.S. at 43; (2) "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," *id.* at 44; (3) "communications containing express words of advocacy of election or defeat," *id.* n.52; (4) "expenditures that in express terms advocate the election or defeat of a clearly identified candidate," *id.* at 45; (5) "express advocacy of election or defeat," *id.*; (6) "funds for communications that expressly advocate the election or defeat of a clearly identified candidate," *id.* at 80; (7) "expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate," *id.*; and (8) "expenditures that expressly advocate a particular election result," *id.* Thus, it is clear that "express advocacy" is a very narrow term.

advocate the election of defeat of a clearly identified candidate for federal office."[6] *Id.* at 43-44. The Court further characterized the "express advocacy" test as the "exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness. . . . " *Id.* at 45.

It is noteworthy that the court of appeals in *Buckley* had attempted to deal with the perceived vagueness of 18 U.S.C. § 608(e)(1) by reading the phrase " 'relative to' a candidate to be read to mean 'advocating the election or defeat of a candidate.' " 424 U.S. at 42. However, this Court held that "the Court of Appeals was mistaken in thinking that this construction eliminates the problem of unconstitutional vagueness altogether." *Id.* Thus, this Court insisted that mere 'advocacy of election' was not enough to bring a communication within the purview of the statutory limitation; rather, the communication must contain "explicit words of advocacy." *Id.* at 43.

There is a pragmatic reason why the express advocacy test must be narrow and explicit. It is because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 42. This follows from the fact that

> [c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. The close relationship between candidates and issues makes the distinction between issue advocacy and electoral advocacy problematic for the speaker; he is placed in a position of doubt, not knowing whether to censor his own speech. As *Buckley* explained,

---

[6] "Express" is defined to mean "clear, definite, explicit. . . . " BLACK'S LAW DICTIONARY 580 (6th ed. 1990). Thus, "express" and "explicit" are synonymous.

> [n]o speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

424 U.S. at 43, *quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945). In order to avoid the "constitutional deficiencies" described in the foregoing quotation (*i.e.*, vagueness and overbreadth leading to self-censorship), *Buckley* held that the statutory expenditure limitations must be "limited to communications that include *explicit words of advocacy* of election or defeat of a candidate." 424 U.S. at 43 (emphasis added).

Under *Buckley's* definition of "express advocacy," disbursements for political communications are accorded complete protection under the First Amendment as long as they remain outside the narrowly-circumscribed category of "express advocacy." Indeed, this Court has never upheld any restriction whatsoever on "issue advocacy" but has placed it beyond the reach of government control. As the Court concluded, "[s]o long as persons and groups eschew expenditures that in express terms advocate the election of a clearly identified candidate, *they are free to spend as much as they want to promote the candidate and his views.*" *Id.* at 45 (emphasis added).

The lower federal courts have uniformly followed *Buckley* in its stringent protection of issue advocacy. The courts have held that the "express advocacy" standard is a strict, bright-line test which must be applied according to its precise terms in order to protect issue advocacy from infringement. Accordingly, they have rejected any suggestion that the

express advocacy test requires anything less than explicit words of advocacy.[7]

---

[7] There are many lower court cases holding that the "express advocacy" standard must be construed narrowly. *See, e.g., Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2nd Cir. 1980) (rejecting the FEC's position (in an enforcement action) which would "have [the court] read 'expressly advocating the election or defeat' to mean for the purpose, express *or implied*, of encouraging election or defeat" and stating that such an expansive interpretation of express advocacy would violate the "firmly established principle that the right to speak out at election time is one of the most zealously protected under the Constitution"); *see, also, Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946 (W.D.Va. 1995), *aff'd per curiam*, 92 F.3d 1178 (4th Cir. 1996) (television advertisement identifying candidate Bill Clinton as pro-homosexual was not express advocacy); *Faucher v. Federal Election Commission*, 743 F. Supp. 64 (D.Me. 1990), *aff'd*, 928 F.2d 468 (1st Cir. 1991), *cert. denied sub nom. Federal Election Commission v. Keefer*, 502 U.S. 820 (1991) (FEC regulation purporting to permit corporate expenditures for voter guides only where guides expressed no opinion on the "issues" covered was beyond FEC's authority under § 441b); *Federal Election Commission v. Survival Education Fund, Inc.*, No. 89 Civ. 0347 (TPG), 1994 WL 9658 (S.D.N.Y.) (expressions of hostility to the positions of an official are not express advocacy even when the implication that the official should not be re-elected is quite clear), *aff'd in part and rev'd in part on alternate grounds*, 65 F.3d 285 (2nd Cir. 1995); *Clifton v. Federal Election Commission*, 927 F. Supp. 493, 500 (D.Me. 1996) (FEC's voter guide and voting record regulations are beyond FEC's authority "because they restrict issue advocacy in connection with expenditures"), *aff'd on alternate grounds*, No. 96-1812 (1st Cir. 1996); *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 839 F. Supp. 1448 (D.Colo. 1993) (advertisement paid for by party committee did not constitute "express advocacy" although it criticized the likely candidate of the other party), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded*, ___ U.S. ___, 116 S.Ct. 2309 (1996); *Federal Election Commission v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989) (solicitation letters by organization were discussions of public issues which by their nature raised the names of candidates, and therefore, not "express advocacy"); and *Federal Election Commission v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979) (a "Nixon-Ford" poster circulated prior to the 1976 election was not "express advocacy" although it included a clearly identified candidate and could have tended to influence voting).

Not only does the government lack the power to limit the *amount* of money spent on issue advocacy, *Buckley* made it clear that government does not even have the power to place the burdens entailed by FECA's disclosure provisions on issue advocacy. Issue advocacy is thus beyond the reach of legislative encroachment, either by monetary limitations or by reporting and disclosure requirements. As this Court held, the disclosure provisions of FECA do "not reach all partisan discussion for [they] only require[] disclosure of those expenditures that expressly advocate a particular election result." 424 U.S. at 80.

C. By protecting issue advocacy from infringement, the "express advocacy" test assures that debate on public issue will remain robust.

This Court developed the "express advocacy" test specifically to implement the central purpose of the First Amendment: the protection of political speech from governmental infringement and concomitant self-censorship. This Court has stated that the purpose of the First Amendment is to further our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times*, 376 U.S. at 270. This principle has particular relevance in the field of election law, because such laws by their very nature seek both to limit the amount of money spent in connection with campaigns and to place other kinds of restrictions on expenditures for political communications (such as disclosure, reporting and registration requirements). *See, e.g.*, 2 U.S.C. §§ 434(b) and 441b. As this Court has explained,

> [a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of

> expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

Buckley, 424 U.S. at 18-19. Thus, the *sine qua non* of robust political discourse is the ability to spend money for political communications. Therefore, while acknowledging that Congress has the general constitutional power to regulate elections for federal office, *id.* at 13, this Court has recognized that the regulation of the election process is fraught with peril to First Amendment freedom of speech. As this Court stated, "[t]he Act's contribution and expenditure limitations operate in an area of the *most fundamental* First Amendment activities." *Id.* at 14 (emphasis added). In particular, this Court wished to protect "issue advocacy" from regulation.

"Issue advocacy" is a broad category which comprises virtually the whole realm of political speech. It encompasses not only abstract discussions of political issues, but also speech concerning candidates. Thus, the statement "Candidate Smith is pro-life" is pure issue advocacy. As this Court recognized, the electorate is concerned not only with what the proper position is regarding an abstract issue, but what position a candidate adopts on such issue. That "Smith is pro-life" (as opposed to whether, considered as an abstract matter, the pro-life position is the correct one) is *itself an issue of vital importance* because the electorate must know such data in order to exercise the franchise wisely. Therefore, that statement is accorded the highest degree of First Amendment protection. To afford protection only to statements concerning the abstract proposition that the pro-life position is correct, while denying protection to the statement "Smith is pro-life" would undercut the instrumental rationale of the First Amendment's protection of political speech discussed above. Simply put, the voting public must have access to the candidates' positions on issues if the American experiment in representative self-government is to succeed. Likewise, speech concerning a candidate's character, qualifications and accomplishments are issue advocacy and, as such, are protected, for a candidate's capacity to carry out the duties of elective office is always at issue in an election. *Buckley*, 424

U.S. at 14-15. Finally, as the *Buckley* Court noted, campaigns themselves generate issues of importance; therefore, speech about the conduct of campaigns is issue advocacy.[8]

As explained above, this Court protected issue advocacy principally through the development of the "express advocacy" test. In addition, however, this Court protected issue advocacy through the development of the "major purpose test" which (as more fully explained below) is a necessary adjunct to the "express advocacy test."

---

[8] This Court's solicitude for "issue advocacy" is measured in part by the great breadth of the definition of that term. For issue advocacy is the antithesis of "express advocacy," and, to the extent that the latter term denotes an extremely narrow category (*see* footnote 5 above), "issue advocacy" is correspondingly broad. Issue advocacy includes all political speech which does not include "explicit words of advocacy of election or defeat of a candidate. . . . " *Buckley*, 424 U.S. at 43. As this Court frequently indicated in *Buckley*, issue advocacy is more than "the mere exposition of ideas." *Id.* at 14. It comprehends much more than the abstract or theoretical discussion of political ideas, but rather, much that is overtly political and much that is directly related to campaigns for elective office. At the very least, issue advocacy comprehends the following: (1) "debate on the qualifications of candidates," *id.* at 14; (2) the "free discussion of governmental affairs," *id.*; (3) "discussions of candidates," *id.*; (4) discussions of the "positions [which candidates take] on various public issues," *id.* at 42; (5) speech concerning "issues of public interest" generated by "campaigns themselves," *id* at 42-43; (6) communications regarding "candidates and their positions [on issues], their voting records and other official conduct," *id.* at 43 n.50; (7) "spend[ing] . . . to promote the candidate and his views," *id.* at 45; (8) "the discussion of public policy," *id.* at 48; and (9) "advocacy of the passage or defeat of legislation," *id.*

II. THE "MAJOR PURPOSE TEST" IS A NECESSARY ADJUNCT TO THE "EXPRESS ADVOCACY TEST"; THE TWO TESTS WORK IN TANDEM TO PROTECT ISSUE ADVOCACY.

A. This Court developed the "major purpose test" in *Buckley* in conjunction with the "express advocacy test" in order to protect issue advocacy.

Above (part II, B hereof) *Amicus Curiae* NRLC discussed the portion of the *Buckley* opinion in which the Court applied the "express advocacy" test to the general disclosure provision of FECA (then-section 434(e)). The "major purpose test" was developed in that same portion of the opinion and, as will be shown, is a necessary adjunct to the "express advocacy" test because it serves to protect the issue advocacy of "non-political committee" groups.

2 U.S.C. § 434(e) required "[e]very person"[9] who makes "contributions or expenditures" greater than $100 in a calendar year to "file a statement containing the information required by" section 434 (which was captioned "[r]eports by political committees and candidates"). Subpart (b) of section 434 required disclosure of a plethora of information concerning receipts and expenditures.

But there was a serious constitutional problem with section 434(e). As this Court explained,

> Section 434(e) applies to "[e]very person . . . who makes contributions or expenditures." "Contributions" and "expenditures" are defined in parallel provisions in terms of the use of money or other valuable assets "for the purpose of . . . influencing" the nomination or election of candidates for federal office.

[9] "Person" was statutorily defined as "an individual, partnership, committee, association, and any other organization or group of persons." 2 U.S.C. § 431(h).

Buckley, 424 U.S. at 77. The Court found the phrase "for the purpose of . . . influencing" to be "ambiguous." *Id.* It presented the specter of "vagueness" and overbreadth[10] because it had the "potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79. Thus, under the plain language of section 434(e), it was possible for a group of persons "other than a political committee . . . "[11] to be subject to the same burdensome disclosure requirements that pertained to *political committees* even though such group engaged in *nothing but issue advocacy*. Simply put, any "person" who spent more than $100 in a year "for the purpose of influencing" an election was required to comply with onerous reporting provisions. However, the phrase which triggered those requirements ("for the purpose of . . . influencing") was constitutionally infirm because of its inherent overbreadth: in addition to express advocacy, that phrase encompassed *issue advocacy*. Issue advocacy could not be infringed because it comprised speech which this Court made clear was entitled to the utmost First Amendment protection due to its integral role in our democracy. *Buckley*, 424 U.S. at 14-15. Thus, a person who did nothing more than discuss issues which arose during campaigns for federal office would have to comply with all of the disclosure provisions of § 434. But, as the Court recognized, FECA imposed criminal sanctions, and "fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights." 424 U.S. at 76. In that event, issue advocacy – vital to the health of representative self-government – will have been irretrievably lost to the electorate. To obviate that problem, this Court placed a narrowing construction on 2 U.S.C. § 434(e):

[10] Although the Court termed the problem with § 434(e) one of "vagueness," it is apparent that it included within that term the related problem of overbreadth. *See MCFL*, 479 U.S. at 623.

[11] *See* 2 U.S.C. § 434(e) reprinted in *Buckley's* appendix, 424 U.S. at 160.

> To insure that the reach of § 434(e) is not impermissibly broad, we construe "expenditure" for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.

424 U.S. at 80.

It is readily apparent that this Court applied the express advocacy test to section 434(e) in order to save issue advocacy from the threat of self-censorship stemming from a vague and overbroad provision enforced by criminal sanctions. Identical reasoning underlay this Court's development of the "major purpose test."

This Court recognized that § 434(a)-(d), which set forth the provisions requiring "reports by political committees," could reach the same result (*i.e.*, severely burdening and chilling issue advocacy) as did § 434(e). Since the general definition of "political committee" contained in § 431(4)(A) defined that term "only in terms of annual 'contributions' and 'expenditures,' " and since those terms, in turn, incorporated the overbroad phrase "for the purpose of . . . influencing," the definition of "political committee" also reached issue advocacy – only by a different route. In short, a group could have its issue advocacy chilled in either one of two ways: (1) as a "person" which makes "expenditures" (*i.e.*, money spent "for the purpose of . . . influencing" elections) of more than $100 in a calendar year; or (2) as a "political committee" under § 431(4)(A) *i.e.*, a group which makes "expenditures" (money spent "for the purpose of . . . influencing" elections) exceeding $1,000 in a calendar year. In either event, the ultimate outcome is the same: a group which does nothing (or next to nothing) -other than make disbursements for issue advocacy communications is subject to all of the burdensome reporting requirements (and contribution limits) which pertain to organizations which are *true political committees under FECA*. Although the statutory mechanism differs slightly, the result is identical: issue advocacy is burdened by a vague and overbroad statutory provision.

Indeed, this Court clearly recognized that the two situations were directly analogous. In response to this similarity,

the *Buckley* Court developed the "major purpose test." The Court recognized that "[t]he general requirement that 'political committees' . . . disclose their expenditures could raise similar vagueness problems. . . . " This followed from the fact that " 'political committee' is defined only in terms of amount of annual 'contributions' and 'expenditures'. . . . " Therefore, because (as the Court had noted previously) the definition of the term "expenditure" incorporates the vague phrase "for the purpose of . . . influencing," the term political committee *itself* "could be interpreted to reach groups engaged purely in issue advocacy." 424 U.S. at 79. Thus, exactly like § 434(e), the definition of "political committee" in § 431(4)(A) must be constitutionally limited in order to protect issue advocacy against government infringement. Noting that two lower courts had construed the words "political committee" more narrowly, the Court stated that "they need only encompass organizations which are under the control of a candidate or *the major purpose of which is the nomination or election of a candidate." Id.* (emphasis added).

Although the "express advocacy" test focuses on the speech itself, and the "major purpose test" focuses on the nature and identity of the speaker, it is clear that they exist for the same constitutional reasons, and that this Court has understood them as a single mechanism. Both tests are limiting constructions on statutory provisions which, in the absence of such constructions, would be unconstitutional for encompassing issue advocacy. Both of them seek to prevent the chilling effect on speech which results from vague or overbroad provisions. Finally, both of them seek to implement the central rationale of the First Amendment: to safeguard the discussion of issues and thereby to preserve self-government.

B. This Court reaffirmed and further explicated the meaning and rationale of the "major purpose test" in *MCFL*.

In *MCFL*, this Court reaffirmed the "major purpose test" as set forth in *Buckley*. The Court there stated:

> In *Buckley v. Valeo*, this Court said that an entity subject to regulation as a "political committee" under the Act is one that is either "under the control of a candidate or the major purpose of which is the nomination or election of a candidate."

479 U.S. at 252 n.6. This Court noted that Massachusetts Citizens for Life (MCFL), the organization which was subject to the enforcement proceeding in that case, was not a "political committee" under the *Buckley* definition in the "major purpose test": "[i]t is undisputed on this record that MCFL fits neither of these categories [*i.e.*, it was not under the control of a candidate, nor was its major purpose the nomination or election of a candidate]." *Id.* Rather, "[MCFL's] central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of candidates." *Id.* Furthermore, MCFL, an organization "that only occasionally engage[d] in independent spending on behalf of candidates," would "be classified as a political committee" if its "independent spending became so extensive that the organization's major purpose may be regarded as campaign activity. . . . " *Id.* at 262. In that event, MCFL would be subject to the "full panoply of regulations that accompany status as a political committee under the Act." *Id.*

MCFL's discussion concerning the "major purpose test" confirms both the common-sense approach taken by this Court in framing the test in *Buckley* (which, as shown below, was repudiated by the court of appeals), and confirms that the object of the major purpose "test" was to obviate the chilling effect of the restrictions which pertain to political committee status. The *MCFL* Court made clear that the "major purpose test" looks at the purpose of the *organization* to determine whether its major purpose is the nomination or election of a candidate. That question, in turn, is answered by examining

the organization's disbursements. A group such as MCFL whose "central organizational purpose is issue advocacy" is not a political committee "although it occasionally engages in activities on behalf of candidates." *Id.* at 252 n.6. An organization only becomes a "political committee" if its "independent spending [becomes] so extensive that the organization's major purpose may be regarded as campaign activity. . . . " *Id.* at 262. Moreover, this Court demonstrated that it understood that the burdens associated with political committee status were severe ("the full panoply of regulations that accompany status as a political committee," *id.*) and that they have the capacity to chill an organization's speech ("the administrative costs of complying with [reporting and disclosure obligations] may create a disincentive for the organization . . . to speak.") *Id.* at 254 n.7.

III. THE DECISION OF THE COURT BELOW IS ERRONEOUS AND WOULD RESULT IN THE EVISCERATION OF THE PROTECTION OF ISSUE ADVOCACY UNDER THIS COURT'S "MAJOR PURPOSE TEST."

The court of appeals held that AIPAC was a "political committee" under the definition contained in § 431(4)(A). *Akins*, 101 F.3d at 744 n.13. This was based on the FEC's finding that AIPAC had made at least $1,000 in "contributions" during a calendar year, and, therefore, had fulfilled the statutory requirement for political committee status under FECA. The court of appeals' decision was made, however, despite the fact that AIPAC had "a budget of about $10 million," (*id.* at 734) and despite the FEC's finding that "AIPAC's campaign spending never even reached one percent of its annual budget." *Id.* at 744 n.13.

The court of appeals explained that, although this Court's statements concerning the "major purpose test" (in *Buckley* and *MCFL*) "*can* literally be read to support the FEC's position," *id.* at 741 (emphasis added), the "Court's rationale in *MCFL* and *Buckley* is simply inapplicable to the present case." *Id.* at 742. The court of appeals noted that § 431(4)(A),

the provision defining "political committee," defined it "solely in terms of 'expenditures' and 'contributions.' " *Id.* at 740. As the court of appeals understood the situation, the "major purpose test" as this Court had fashioned it was concerned *only* with "the constitutional concerns raised by *independent expenditures* . . . as distinguished from coordinated expenditures or direct contributions." *Id.* at 741.

The court of appeals decision is erroneous for several reasons. On a fundamental level, the court simply misread the actual language in *Buckley* and *MCFL*. The reading of those passages is ungrammatical and, therefore, highly implausible. Second, the court of appeals confounded the nomenclature of election law, confusing "independent expenditures" with "issue advocacy" expenditures. This mistake, it appears, led to the third and most serious error in the court's reasoning: because it focused only on "independent expenditures" rather than upon "issue advocacy" expenditures, the court of appeals turned a blind eye to the manner in which its interpretation of the "major purpose test" burdens issue advocacy. The court entirely failed to recognize that the broad definition of "political committee" which depended upon the making of "contributions" would have a massive deterrent effect on a group's exercise of its right to engage in "issue advocacy." As a result, the court of appeals enunciated an eviscerated version of the "major purpose test" which completely fails to protect issue advocacy.

A. Contrary to the court of appeals, the plain language that this Court used indicates that the "major purpose" at issue is that of the organization, not the disbursement.

In its discussion of this Court's development of the "major purpose test," the court of appeals stated that

> the [Supreme] Court did state in *Buckley* that the term political committee "need only encompass *organizations* that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." And this notion was

> repeated in *MCFL*: "an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.' "

101 F.3d at 741. The language employed by this Court and quoted by the court of appeals clearly – as a matter of grammar – indicates that the "major purpose" in question is that of the "organizations," not that of their expenditures; for the antecedent of the word "which" is obviously "organizations." Therefore, it cannot plausibly be maintained (as the court of appeals opines) that

> the better interpretation of this language . . . is that when an *organization* controlled by a candidate or the major purpose of which is election-related makes disbursements, those disbursements will presumptively be *expenditures* within the statutory definition.

Id. at 742. On the contrary, the words this Court used in the "major purpose test" were carefully chosen and not ambiguous in the least. In dealing with *MCFL's* "major purpose" language, the court of appeals made a similar misstep. The court stated that

> the [Supreme] Court's analysis clearly distinguished between contributions and expenditures: "should MCFL's *independent spending* become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee."

Id. (emphasis in original). By emphasizing the words "independent spending" the court obviously intended to demonstrate this Court's intention to protect "independent expenditures." But this is a highly strained and implausible reading. The plain meaning of the passage, on the contrary, is that: (1) it is the "*organization's* major purpose" which is at issue; and (2) that the way in which to determine whether an organization could be classified as a political committee was on the basis of its disbursements.

Therefore, the court of appeals was wrong to attempt to fashion an interpretation of the major purpose test which (even that court conceded) arguably departed from a "literal[ ] . . . read[ing]" of this Court's words. *See id.* at 741.

B. Contrary to the court of appeals, "independent expenditures" are not the most protected form of political speech, nor are they at issue in this case.

The court of appeals' focus on the major purpose of an organization's expenditures (as opposed to the major purpose of the organization itself) may have stemmed in part from the court's misunderstanding of the nomenclature in election law. For example, the lower court stated that

> [i]ndependent expenditures are the most protected form of political speech because they are closest to pure issue discussion and therefore farthest removed from the valid goal of preventing election corruption.

101 F.3d at 741. The court's use of the term "independent expenditure" in the preceding passage is simply wrong. For "independent expenditure" is a term of art in election law. It "means an expenditure by a person *expressly advocating the election or defeat of a clearly identified candidate* which is made without cooperation or consultation with any candidate. . . . " 2 U.S.C. § 431(17) (emphasis added). Thus, when the court below stated that independent expenditures are "closest to pure issue discussion," it was exactly wrong. On the contrary, "independent expenditures" are the *opposite* of "pure issue discussion." Moreover, while it is true that independent expenditures are entitled to a very high degree of First Amendment protection, they are not "the most protected form of political speech." 101 F.3d at 741. Rather, issue advocacy expenditures are afforded the most First Amendment protection. For while "independent expenditures" may be subject to reporting and disclosure requirements under the rule of *Buckley* and its progeny (*see* § 434(c) providing that independent expenditures by persons other than political committees are subject to disclosure), "issue advocacy" is

immune from such requirements. Indeed, as stated above, this Court has never permitted any restrictions on issue advocacy because of its vital role in representative government.

Although the court below appears to have recognized that the "major purpose test" was created to deal with a problem of constitutional dimension (*see Akins*, 101 F.3d at 743 n.11), it failed to focus on the problem which actually motivated this Court to develop the test, *i.e.*, the protection of issue advocacy. This is illustrated by the fact that (as has been discussed at length above) the portion of the *Buckley* opinion in which the major purpose test was first mentioned is one of the portions of the opinion devoted exclusively to the protection of *issue advocacy* as opposed to independent expenditures.

C. Contrary to the court of appeals, there is a serious constitutional problem in treating organizations such as AIPAC as "political committees"; the court of appeals' understanding of the "major purpose" test would have dire implications for the First Amendment protection of issue advocacy.

The opinion of the court below would result in subjecting issue advocacy groups to the full panoply of political committee disclosure requirements and contribution limits because of the fact that they had made a single $1,000 contribution to a candidate for federal office in a calendar year. Under the court of appeals' decision, a corporation which expends $10,000,000 for issue advocacy and makes a single $1,000 direct contribution to a candidate will have all of its issue advocacy severely burdened. As indicated above, the court of appeals did not come to grips with this, apparently because it believed that the evil to be avoided by the major purpose test was the infringing of "independent expenditures" rather than expenditures for "issue advocacy." The court made a simplistic distinction between "contributions" on the one hand and "expenditures" on the other. Since "expenditures" were generally entitled to more constitutional protection than "contributions," the court believed that this

> Court's rationale in *MCFL* and *Buckley* is simply inapplicable to the present case. There is no constitutional problem with applying § 431(4)(A) to AIPAC or to other organizations making campaign contributions.

101 F.3d at 742.

On the contrary, there is a grave constitutional problem with applying § 431(4)(A) to groups engaged primarily in issue advocacy. The decision below will have a chilling effect on the exercise of both the right of free speech and on the right of free association. The decision pits these two rights against each other. By exercising its right to political association through making a contribution, a group will be required to expose *all of its issue advocacy* to the burdens of disclosure. By exercising its right to unencumbered issue advocacy, it forfeits its right to make even a small amount of contributions to candidates. The upshot of this decision is clear: organizations which have an overall "political" purpose are put to a choice: either their activity must consist of one-hundred percent issue advocacy, or – if they make a single candidate contribution of $1,000 in a year – they must comply with the reporting requirements of FECA *as to all of their disbursements*, and their ability to make contributions will be severely limited as well.

D. Contrary to the court of appeals, the major purpose test examines disbursements in order to determine whether an entity is a "political committee."

The court below purported to look at the organization's purpose in order to determine whether an expenditure was subject to the statutory requirements. But that inquiry is exactly the reverse of what it ought to be. The "major purpose test" as properly understood, looks at its disbursements in order to determine whether an organization is a "political committee." Not only is that the view which (as shown above) is garnered from a natural reading of *Buckley* and *MCFL*, but it is the only view which makes any sense from a practical

point of view. For, under the lower court's view, one must first determine whether the group is a political committee, *i.e.*, whether its "major purpose" is "election-related." 101 F.3d at 742. Only then can one determine whether the group's disbursements are "*expenditures* within the statutory definition." *Id.* But this reasoning is circular: for how can one tell in the first instance what a group's "major purpose" is if not by examining the nature of its disbursements?

Moreover, the statutory scheme of the disclosure provisions does not discretely regulate only "contributions" or only "expenditures." Rather, the disclosure burdens are general. The question facing the person who wonders whether his organization must file disclosure statements under § 434 is straightforward: Are we a "political committee?" If the answer is yes, then the group must disclose the entire panoply of information required by § 434(b). In other words, due to the very structure of the statute, there is no reason to ask the question that the court of appeals posits as the preeminent question: Are our disbursements "expenditures" within the statutory definition? Any question concerning "expenditures" is purely subsidiary; it is only a way of determining what the "major purpose" of the group is, which question, in turn, is only important in order to determine whether the group is a "political committee" and thus, subject to the applicable disclosure requirements and contribution limits.

Even the court below would presumably agree that an organization which made *no* disbursements except for "issue advocacy" communications would be exempt from the requirements which pertain to "political committees." Thus, starting from the proper analytical point of departure, an issue advocacy organization is not, in the first instance, a political committee. What result obtains, however, when an organization which spends, for instance, $10,000,000 on issue advocacy decides that it wants to make a single $1,000 contribution to a candidate for federal office who shares the organization's view on an important issue? Under the view of the court of appeals, such an organization automatically becomes a "political committee." It must then comply with

the "full panoply of regulations which accompany status as a political committee. . . . " *MCFL*, 479 U.S. at 262.

Under the rule enunciated in *Buckley* and *MCFL*, such an organization was not a "political committee." Indeed, this Court specifically stated in *MCFL* that the organization there was *not* a political committee. *Id.* Nor did an organization become a political committee until it exceeded a threshold known as the "major purpose test." That test considered the actual behavior of the organization to see what kind of organization it was. If its major purpose (as deduced from its disbursements, whether they are considered "expenditures" or "contributions" under the Act) was to elect candidate(s), then it could constitutionally be subjected to the political committee disclosure requirements. *Id.* If not, then it was immune from those requirements. *Id.*

This rule has two related salutary benefits: (1) organizations will know how to structure there disbursements (at least to a great degree) so as to avoid being labelled as "political committees," and, therefore, their issue advocacy expenditures would not be chilled; and (2) the FEC and the courts will know how to discern when an organization was, for constitutional purposes, a "political committee." Under the rule announced below, on the contrary, these benefits are lost.

The court below disparages the common-sense interpretation of the "major purpose test" espoused here and by the FEC in the proceedings below. That interpretation, the court stated, would

> allow a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements imposed on political committees.

101 F.3d at 743. According to the court, "[t]his would wholly eviscerate the $1,000 limit in § 431(4)(A)'s definition of "political committee." *Id.* However, as demonstrated above, the interpretation which the court of appeals places on the 'major purpose test' " would have a severe chilling effect on a much more important value: free discussion of issues under the First Amendment – a value which undergirds our entire

system of government. For every organization which spends virtually all of its budget on issue advocacy but only a tiny portion on "contributions" would have *all* of its issue advocacy severely burdened by the political committee disclosure requirements and contribution limitations. This would result in self-censorship by such committees and, ultimately, in a reduction in the "quantity of expression," a result that the First Amendment will not tolerate. *Buckley*, 424 U.S. at 19.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court of appeals.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Paul R. Scholle
Bopp, Coleson & Bostrom
2 Foulkes Square
401 Ohio Street
P.O. Box 8100
Terre Haute, IN 47808
(812) 232-2434
Counsel for Amicus Curiae National Right to Life Committee, Inc.

August 21, 1997